

STATE OF MICHIGAN  
COURT OF APPEALS

---

MARY ELIZABETH FESCHUK,

Plaintiff-Appellant,

v

WILLIAM FESCHUK,

Defendant-Appellee.

---

UNPUBLISHED

April 28, 2000

No. 211155

Oakland Circuit Court

LC No. 95-507350-DO

Before: Cavanagh, P.J., and Holbrook, Jr. and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right from a March 31, 1998, order denying plaintiff's motion to amend judgment and granting defendant's request for attorney fees in the amount of \$1,960. We affirm.

The trial court entered its judgment of divorce on January 12, 1998, ordering that the marital home, which was inherited by defendant from his father, would be divided as follows: plaintiff would receive one-half of the amount of the increased property value from November 15, 1988, the date that it was deeded to defendant, through November 1, 1995, the date that plaintiff filed her divorce complaint, less one-half of any unpaid property taxes for that period. The property was awarded to defendant subject to these awards. On February 2, 1998, plaintiff moved to amend judgment requesting that the commencement date used for valuation of the marital home be changed to June 16, 1986. Plaintiff argued that, because defendant's father died on June 16, 1986, that is when title vested in defendant.

Plaintiff argues that because real property of a testate decedent is transferred to a devisee as of the date of the testator's death, rather than the date of conveyance by deed from the personal representative to the devisee, the proper commencement date to use for valuation purposes in determining the appreciation on the property during the marriage is the date of the testator's death.

"The law favors an early vesting of estate in real property." *Hudson v Lindsay*, 383 Mich 126, 131; 174 NW2d 822 (1970). When the owner of real estate dies, title passes to and vests in decedent's heirs and not to decedent's personal representatives. *Parkeiki v Fargo*, 344 Mich 518, 522; 73 NW2d 924 (1955). Where time of passage of title of real estate devised is in question,

probate of a will is retroactive back to date of testator's death. *Stewart v Hunt*, 303 Mich 161, 167; 5 NW2d 737 (1942). "In a testate estate it is the will that gives title. When probated, it is an instrument of title, relating back to the death of the testator and taking effect as of that time." *In re Allen's Estate*, 240 Mich 661, 665; 216 NW 446 (1927).

Although in this case it is true that title to the marital home vested in defendant at the date of defendant's father's death for matters of probate, the instant case is a divorce action. In a divorce action, "[t]he division of marital property is within the sound discretion of the trial court," *Lesko v Lesko*, 184 Mich App 395, 399; 457 NW2d 695 (1990), while the valuation of the marital assets is a finding of fact that this Court will reverse only if the valuation has been found to be clearly erroneous, *Pelton v Pelton*, 167 Mich App 22, 25; 421 NW2d 560 (1988). "The trial court may, but is not required to, accept either parties' [sic] valuation evidence." *Id.* The actual date to be used for valuation of a marital asset for purposes of dividing and distributing assets in a divorce action is within the discretion of the trial court. *Burkey v Burkey*, 189 Mich App 72, 76; 471 NW2d 631 (1991). In this case, the court vacillated several times between using the date that defendant's father died, June 1986, and the date that title was actually deeded to defendant, November 1988, as a starting point for appreciation valuation of the marital home. The court's final decision was to use the date that title was deeded to defendant. The court reasoned that November 1988 was the date that defendant actually received title to the property; that it took defendant two years to clear title; that there was no fraud involved; that defendant was already living in the house; that there was no ill will on the part of defendant to delay the transfer of title; that the time for creditors to file claims against the estate continued throughout the pendency of the independent estate and during this time defendant's interest in the property was problematic; and that defendant did not have an absolute or final title until the warranty deed was issued to him on November 15, 1988. Given these reasons, the court did not abuse its discretion by using the date that title actually transferred to defendant for valuation purposes on the inherited marital home.

Next, plaintiff argues that the trial court abused its discretion in awarding defendant costs and attorney fees incurred in responding to plaintiff's motion to amend the judgment. Plaintiff argues that the award was in error because plaintiff firmly believed that her motion to amend judgment had merit and was filed in good faith.

In this case, a judgment of divorce was entered on January 12, 1998. On February 2, 1998, plaintiff moved to amend the judgment stating that the commencement date for valuation purposes on the marital home should have been 1986 rather than 1988 because title to the marital home vested in defendant in 1986. Plaintiff argued that the case that the court cited as controlling, *Polate v Polate*, 331 Mich 652; 50 NW2d 190 (1951), was not applicable to this case. Plaintiff cited *In re Allen's Estate*, *supra*, 246 Mich 665, *Stewart*, *supra*, 303 Mich 167, and Standard 7.2, Title Derived Through Testate Decedent from the State Bar of Michigan, Michigan Land Title Standards as authorities that were on point and that indicated that, because title vested in defendant immediately upon death of defendant's father, the commencement valuation date on the marital home should have been 1986. Defendant responded to the motion and requested attorney fees in the amount of \$1,960 incurred as a result of plaintiff's "constant rehashing of this issue" in this already protracted litigation.

Defendant also pointed out that the court had awarded \$3,000 in attorney fees as part of the judgment because of plaintiff's prior dilatory acts. Plaintiff did not address defendant's request for attorney fees in her reply brief.

The court filed an opinion and order which first ruled that plaintiff's motion to amend judgment was a motion for reconsideration under MCR 2.114(F), rather than a motion to amend judgment under MCR 2.611(A)(1)(e) and (g), because plaintiff merely presented the same issues already ruled on by the trial court. The court then denied the motion because plaintiff did not demonstrate a palpable error by which the court and parties were misled and did not show that a different disposition of the motion would result from correction of the error. The court granted defendant's request for fees and costs, and ordered plaintiff to pay defendant \$1,960 incurred in responding to plaintiff's motion to amend judgment. The court ruled that the award was subject to plaintiff's objection to the amount, which, if she objected, would entitle her to a hearing. Plaintiff did not file objections, but, rather, filed this appeal claiming that the court erred in ordering plaintiff to pay defendant's fees and costs.

"Awards of costs and attorney fees are recoverable only where specifically authorized by a statute, a court rule, or a recognized exception." *Phinney v Perlmutter*, 222 Mich App 513, 560; 563 NW2d 532 (1997). This Court has held that "an award of legal fees is authorized where the party requesting payment of the fees has been forced to incur them as a result of the other party's unreasonable conduct in the course of litigation." *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723 (1992). Upon such a determination "a trial court has the discretion to award such fees as are necessary and reasonable, and a court's determination in this regard will not be reversed on appeal absent an abuse of that discretion." *Id.* The trial court, in ruling that plaintiff's motion to amend was actually a motion for reconsideration, implicitly agreed with defendant that plaintiff was rehashing issues already argued and addressed by the court prior to entry of judgment. Under these circumstances, we cannot say that the court abused its discretion by granting defendant's request for fees.

Affirmed.

/s/ Mark J. Cavanagh  
/s/ Donald E. Holbrook, Jr.  
/s/ Michael J. Kelly

\_\_\_\_\_  
\_\_\_\_\_